IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LOUISIANA MUNICIPAL POLICE EMPLOYEES' RETIREMENT SYSTEM, on behalf of itself and all other similarly situated shareholders of Landry's Restaurants, Inc., and derivatively on behalf of nominal defendant Landry's Restaurants, Inc.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 4339-VCL
TILMAN J. FERTITTA, STEVEN L. SCHEINTHAL, KENNETH BRIMMER, MICHAEL S. CHADWICK, MICHAEL RICHMOND, JOE MAX TAYLOR, FERTITTA HOLDINGS, INC., FERTITTA ACQUISITION CO.,	)	
Defendants, and	)	
LANDRY'S RESTAURANTS, INC.	)	
Nominal Defendant.	)	

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR
MOTION TO DISMISS AND MOTION TO STAY DISCOVERY

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PRELIMINARY STATEMENT

Plaintiff challenges a failed merger that was negotiated, and re-negotiated, in troubled and uncertain times in our economy generally, and particularly for the restaurant and gaming industries. Credit markets collapsed. Large financial institutions failed. The stock market plunged. People stayed home to eat and did not travel to luxury vacation spots like Las Vegas (where the Company owns and operates a casino).

The operating results and fortunes of Landry's Restaurants, Inc. ("Landry's" or the "Company") declined and the Company faced similar uncertainties. In addition to suffering from the national macroeconomic downturn, Landry's also felt the havoc created by Hurricane Ike, which unleashed its wrath on the eastern coast of Texas in early September 2007, where the Company operates numerous restaurants.

These were the circumstances faced by Fertitta and the other directors of Landry's in 2008 and early 2009. The directors who considered the transaction and negotiated with Fertitta and his lending banks, were all sophisticated individuals who were independent of Fertitta and advised by well-known and independent legal and financial advisors (Morris, Nichols; King & Spalding; and Cowen & Company, LLC). These directors, constituting the Special Committee, considered the offers from Fertitta and his entities, and well appreciated that if a transaction were not consummated, the Company needed to refinance $400 million of debt (the "Debt") as early as February 28, 2009.

As demonstrated in our opening brief and below, the actions taken and considered by the Defendants are entitled to the presumption of the business judgment rule and the claims asserted by Plaintiff should be dismissed. Contrary to the assumption throughout Plaintiff's brief, the lending banks, which ultimately agreed to refinance the Debt, were not the "Company's Banks."

Rather, Jefferies and Wells Fargo Foothills ("WFF" and, together with Jefferies, the "Lending Banks") had agreed to finance Fertitta's entities' acquisition of the Company and, only through the intervention of Fertitta – pre-authorized by the Special Committee – agreed to refinance the Debt in the event the Merger were not consummated. The stockholders of Landry's benefited from these actions and the independent Special Committee, after numerous meetings and consultations with its advisors, the Lending Banks, and Fertitta, determined that the best interests of the stockholders required termination of the Merger due to an unwavering request from the United States Securities and Exchange Commission (the "SEC"). The facts as pled and contained in the revised proxy statement and press releases[1] do not state a claim upon which relief may be granted. Accordingly, Defendants respectfully submit that the complaint be dismissed with prejudice.[2]

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[1] Plaintiff concedes that these documents are incorporated into its complaint and are properly considered on this motion to dismiss. Op. Br. at 12 n. 7.

[2] Plaintiff did not amend the complaint in response to the opening brief, thus dismissal with prejudice is appropriate. Ct. Ch. R. 15(aaa).

COUNTERSTATEMENT OF FACTS

Defendants will not restate the relevant facts and respectfully refer the Court to the Statement of Facts set forth in their opening brief. *See* Op. Br. at 3-17. Given the liberties taken by Plaintiff in its answering brief, however, Defendants note and emphasize the following facts:

The Special Committee was comprised of three members of the Board of the Company, none of whom are even suggested by Plaintiff to be interested in the challenged transaction or not independent of Fertitta. Likewise, Plaintiff does not question the independence or qualifications of the Special Committee's legal or financial advisors. As detailed in the Revised Proxy Statement, the Special Committee and its advisors met repeatedly to consider, reflect upon, and respond to the difficult economic circumstances faced by the country and the Company. Indeed, the care and attention paid by the members of the Special Committee to the transaction is detailed in 49 single-spaced pages in that proxy statement.

At bottom, Plaintiff's claims rest on three mistaken facts, all of which are rebutted by the Revised Proxy Statement relied upon and incorporated into Plaintiff's complaint. A brief review of those errors follows:

Plaintiff criticizes Fertitta's "role" in the transaction, alleging that he was given "exclusive domain over negotiations with the Company's lenders." Ans. Br. at 2. Plaintiff makes two fatal assertions in its zeal to state a claim.

At the outset, the lenders referred to by Plaintiff – Jefferies and WFF – were not the "Company's lenders." Rather, as disclosed by the Company, Jefferies and WFF were *Fertitta's* "prospective lenders." Revised Proxy at 38; *see also* Jan. 12, 2009 press release at 1.[3]

[3] The Revised Proxy and the January 12, 2009 press release are attached as Exhibits A and F, respectively, to the Transmittal Affidavit of Scott W. Perkins filed contemporaneously with Defendants' Opening Brief in Support of Their Motion to Dismiss. Trans. ID 24485300.

Moreover, management, including Fertitta (as the Company's CEO) was requested by the Special Committee to pursue a plan to refinance the Debt in the event the going-private transaction with Fertitta's entities did not close. Revised Proxy at 50. Fertitta and other members of management contacted numerous potential lenders. Revised Proxy at 42, 52. Ultimately, only the Lending Banks agreed to provide backstop financing of the Debt in the event the Merger were not consummated. In addition, the discussions with the Lending Banks were not conducted solely by Fertitta as Plaintiff suggests (Ans. Br. at 25-26). In reality, both the Special Committee and its advisors met with representatives from Jefferies, including immediately prior to the announcement of the revised transaction in October 2008. (Revised Proxy at 52).

Finally, while Plaintiff gives no weight to the unprecedented collapse in the financial credit market, the implosion of major financial institutions, the uncertainty created in the markets as a result of the perilous state of the economy, or the effects of Hurricane Ike, those factors were front and center on the minds of the members of the Special Committee. The committee met at least forty-four times over the course of the negotiations (not including any meetings taking place after October 18, which is the last meeting date listed in the Revised Proxy), and considered the impact of these events on the Company and the transaction in consultation with its legal and financial advisors. While the parties can debate whether the MAE clause was triggered, whether Fertitta should have been prevented from purchasing shares of Company stock in the market, or whether the SEC's informational demand was appropriate, what is not contestable is the good faith, honest and careful approach taken by the directors to consider each of these issues and more, to arrive at a business decision that they believed to be in the long-term

best interests of the Company and its stockholders. As reflected in the Company's January 12, 2009 press release:

> Given our need to refinance approximately $400 million in senior notes, and the existing worldwide credit crisis, [the Special Committee] felt that it was in the best interests of our stockholders to terminate the Merger Agreement in order to maintain the alternative financing.

The risk to the Company of any other decision (i.e., to call the lenders' bluff) was just too great. The decisions of the Special Committee and the Board were compelling. No viable claim for relief can be based on these facts.

ARGUMENT[4]

Defendants' Opening Brief details the reasons why the Complaint fails to state a claim upon which relief can be granted. Rather than reiterate that detail here, the argument below simply demonstrates that nothing in the Plaintiff's Answering Brief compels this Court to reach a different result.

I. PLAINTIFF DOES NOT CONTEST THAT IT LACKS STANDING TO SEEK AN ORDER OF THE COURT REQUIRING FERTITTA AND LANDRY'S TO CONSUMMATE THE MERGER

The Complaint seeks, in part, an order requiring "Fertitta and the Fertitta Entities to consummate the Buyout." Compl. ad damnum ¶ (d). In the Opening Brief, Defendants noted

[4] To the extent Plaintiff suggests that its claims cannot be dismissed so long as any set of facts that conceivably could be proven within the framework of the Complaint would merit relief, *see* Ans. Br. at 20-21, such a suggestion is at odds with the current standard for review on a motion to dismiss. In accordance with the U.S. Supreme Court's holding in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), Delaware courts have held that they will dismiss a complaint that does not "plead enough facts to *plausibly suggest* that the plaintiff will ultimately be entitled to the relief she seeks." *Desimone v. Barrows*, 924 A.2d 908, 928-29 (Del. Ch. 2007) (emphasis added); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *id.* at 1953 ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions....'"); *Twombly*, 550 U.S. at 570 ("Because plaintiffs ... have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.")

that because Plaintiff is not a party to nor third party beneficiary of the relevant agreements (which, in any event, have been terminated), it lacks standing to seek their specific performance. Op. Br. at 43-44. Moreover, at this point in time, specific performance is simply an impracticable remedy. *Id.* Plaintiff does not address this argument in the Answering Brief, has therefore conceded that Defendants' argument on this point is correct, and the claims should be dismissed. *See, e.g., Harbor Fin. Pr's Ltd. v. Butler*, 1998 WL 294011, at *5 n.1 (Del. Ch. June 3, 1998) (failing to respond to argument raised in opening brief "concede[s] the point"), *rev'd on other grounds sub nom., Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843 (Del. 1998).

II. PLAINTIFF HAS FAILED TO STATE A CLAIM AGAINST FERTITTA

A. To The Extent Fertitta Acted in His Capacity as CEO, Plaintiff Has Failed to Allege that Fertitta Acted Disloyally

"Th[e] duty of loyalty . . . embodies not only an affirmative duty to protect the interests of the corporation, but also an obligation to refrain from conduct which would injure the corporation and its stockholders or deprive them of profit or advantage. In short, directors must eschew any conflict between duty and self-interest." *Ivanhoe Pr's v. Newmont Mining Corp.*, 535 A.2d 1334, 1345 (Del. 1987). Plaintiff fails to present any facts from which the Court could infer that Fertitta *qua* CEO acted to injure the Company or the other Landry's stockholders. Nor are there facts to suggest that any of Fertitta's actions deprived the other stockholders of any advantage. To the contrary, the sole challenged actions of Fertitta taken as CEO, to obtain alternative financing in the event the Merger were not consummated, plainly benefited all Landry's stockholders. The fiduciary duty of loyalty claims against Fertitta should therefore be dismissed.

Plaintiff does not dispute that Fertitta, as a stockholder, was permitted to purchase Landry's shares on the open market. Rather, in apparent disregard of the fact that Fertitta did not

participate in any of the Special Committee's deliberations concerning the transaction, shopping the Company, or revising the Merger Agreement, Plaintiff claims that Fertitta's position as Chairman and CEO of Landry's enabled him to gain a controlling interest of Landry's stock and intentionally sabotage the transaction once he no longer "needed" it to close. Specifically, Plaintiff alleges that Fertitta breached his fiduciary duties when he: (1) contacted the Lending Banks to "inquire" as to whether they believed the deal could be "derailed" based on recent events including the hurricane and the credit crisis; (2) told the Board that he "believed" the Lending Banks "may" seek to renegotiate the transaction; (3) controlled communications between the Board and the Lending Banks; (4) acted as the Company's sole spokesperson in "negotiating" the terms of the refinancing of the Company's debt; (5) ensured that the Lending Banks linked the refinancing of the Company's upcoming debt repayment to drastically lowering the deal price, and convinced the banks to "refuse to refinance the debt if no deal went through"; (6) obtained majority control of the Company without paying a control premium to the stockholders by making multiple open market purchases of Landry's shares at a discount to the amended deal price; and (7) pressured the Board to release him from his obligation to pay the Reverse Termination Fee or close on the Merger after the SEC requested information about the Amended Debt Commitment. *See* Ans. Br. pp. 25-26.

In short, Fertitta's alleged acts of disloyalty fall within three general categories: (1) his contact with the Lending Banks regarding the status of the financing for the Merger and the refinancing of the Company's Debt; (2) his open-market purchase of shares at a lower price than the Amended Agreement price; and (3) his putting "pressure" on the Board to release him from the Reverse Termination Fee once it became apparent that the Lending Banks would not permit disclosure of certain information about the amended debt commitment that the SEC demanded

be disclosed. Plaintiff does not substantiate its claims that any of these actions were disloyal, even if taken by Fertitta in his capacity as CEO and Chairman of Landry's instead of in his capacity as a stockholder and potential acquirer. Instead, Plaintiff relies again upon conclusory allegations and, as further detailed below, wholly distinguishable precedent.

1. Fertitta Did Not Breach His Fiduciary Duty of Loyalty In His Contacts With the Lending Banks Concerning The Transaction And The Alternative Financing

Without citing any supporting case law or factual support, Plaintiff hypothesizes that "[t]he hammer that Fertitta held over the Special Committee came from using his position as Chairman and CEO to negotiate with the Lending Banks and to convince those banks to link the refinancing of Landry's debt to handing Fertitta control of the Company at a dramatically lower price." Ans. Br. at 23. This is nothing more than speculation, and, since the Court does not "draw unreasonable inferences in the plaintiff's favor", *Gantler v. Stephens*, 965 A.2d 695, 704 (Del. 2009), such speculation is insufficient to withstand a motion to dismiss.

Before addressing the merits of these arguments, it is necessary to address Plaintiff's unwarranted assumption that there was an inherent breach of the fiduciary duty of loyalty in Fertitta's contact with the Lending Banks, the banks that were to lend to *Fertitta and the Fertitta Entities* the funds to consummate the Merger with Landry's. As demonstrated herein, Fertitta did not usurp the Special Committee's authority to communicate with the Lending Banks about either the original transaction, the amended transaction, or the alternative financing commitment that he was able to secure for the Company.

Plaintiff suggests that Fertitta's position as Chairman and CEO of Landry's enabled him to have a significant degree of contact with the Lending Banks that he would not otherwise have, even as a potential acquiror. This argument lacks any foundation in fact or logic, as it is entirely reasonable for any lending bank in any transaction to be in communication with the acquiring

party who will be borrowing the funds necessary to consummate the transaction. Whether the acquirer is simply a substantial stockholder or a stockholder and director or officer of the target company makes no difference in the banks' need to communicate with the person or entity who put in the application for financing. Simply put, the Lending Banks had a relationship with Fertitta, not with the Company. Of course he had a direct line of communication with them. Any allegation that Fertitta controlled the Lending Banks or any of their decisions is rank speculation.

Next, Plaintiff specifically alleges that Fertitta contacted the Lending Banks to inquire as to whether they "believed" that the Merger could be "derailed" due to the hurricane and other events, thus planting that idea in the minds of the Lending Banks. Ans. Br. at 25. Other than conclusory allegations, however, Plaintiff has not identified any facts to suggest that Fertitta initiated this discussion, nor that he did so with a motive to manipulate the Lending Banks into misconstruing the Merger Agreement. It is far more reasonable to infer that Fertitta inquired as to the status of the financing to make sure the deal was still on track – *i.e.* that he still had his financing in place. At bottom, the Lending Banks are presumed to act in their own financial best interest and, absent control of those banks by Fertitta, no claim can be based on an inquiry by one party to independent third parties. As was no doubt his obligation, Fertitta advised the Lending Banks about the damage to the Company's properties. Revised Proxy at 38. The Lending Banks then contacted the Company directly to gauge the impact of the hurricane on the Company's business, and thereafter toured the properties in Kemah and Galveston to assess the damage. *Id.* at 38-39.

Indeed, Plaintiff's arguments oversimplify the version of events detailed in the Complaint, which corroborate Fertitta's statements to the Special Committee. There, Plaintiff

alleges that, in a letter exchange between Fertitta and the Special Committee regarding Fertitta's efforts to obtain financing, Fertitta attached a letter from Jefferies, one of the Lending Banks, in which Jeffries advised Fertitta (*not* the other way around) that, in light of the effects of Hurricane Ike, the Lending Banks believed that the Fertitta entities might not be able to satisfy the conditions precedent in the original Debt Commitment Letter. Compl. ¶ 40; Revised Proxy at 43. Again, Plaintiff's "claim" fails for lack of factual foundation.

Similarly, the argument that Fertitta's role in securing from the Lending Banks an alternative financing commitment for the Company in the event that the acquisition was not consummated was somehow an act of disloyalty is unavailing. Fertitta secured, at the behest of the Special Committee, the alternative backstop financing commitment as a fail-safe mechanism in the interest of the Landry's stockholders. *See* Op. Br. at 12; Revised Proxy at 55-56. Conveniently, Plaintiff ignores the fact that Fertitta and other members of management contacted numerous potential lending sources but the only lenders interested were the Lending Banks. Revised Proxy at 42, 52. Thus, without Fertitta's assistance, the Landry's stockholders likely would have faced the stark choice of either (1) voting for the Amended Merger Agreement or (2) watching the Company fall into bankruptcy. *See* Revised Proxy at 46. Without other financing options or transactional partners, there were no other available options.

This choice presents an interesting contrast with the facts in *Lacos Land Co. v. Arden Group, Inc.*, 517 A.2d 271 (Del. Ch. 1986), the case that Plaintiff suggests is factually analogous to this case. Ans. Br. at 22. In *Lacos Land*, there was a documented threat by a CEO and controlling stockholder in the target company's proxy statement that the CEO would oppose transactions in the best interests of the corporation unless the stockholders approved a recapitalization proposal that would benefit the CEO at their expense. 517 A.2d at 276-77. With

respect to the alternative financing commitment by the Lending Banks, there was no such conflict between the interests of Fertitta and those of the other Landry's stockholders; instead, those interests were directly aligned. While it presents an interesting conspiracy theory, there is simply no evidence from which the Court can reasonably infer that Fertitta somehow manipulated the Lending Banks into making their willingness to finance the Company's Debt contingent upon stockholder approval of the Amended Merger Agreement. In fact, as set forth in the Revised Proxy:

> [T]his refinancing proposal would allow our stockholders voting on a revised merger transaction to make a decision that is not influenced by concerns about our ability to refinance our indebtedness.

Revised Proxy at 50.

2. Fertitta Did Not Breach The Duty of Loyalty When He Purchased Landry's Shares On The Open Market

The subtext of Plaintiff's loyalty argument with respect to Fertitta's purchases of Landry's stock on the open market is that Fertitta attempted to "derail" the transaction to drive down the Company's stock price; and once the stock price was down, he bought the stock at a discount price, thus creating an inference that Fertitta never intended to consummate the Merger.[5]

Absent a standstill agreement or other contractual arrangement, nothing precluded Fertitta, even as CEO, from purchasing shares of the Company's stock on the open market. His status as CEO did not preclude him from obtaining a greater percentage of the Company's stock before consummating the transaction. Plaintiff does not refute that it would have been economically irrational for Fertitta to continue to purchase shares on the open market – at a time when the price of those shares incorporated the planned successful completion of the merger – if

[5] In the Answering Brief, Plaintiff concedes that it is "not asserting a standalone insider trading claim against Fertitta." Ans. Br. at 28.

he knew all along that the Merger would not be completed. Such a state of events would mean that Fertitta was knowingly purchasing open market shares at an inflated price, not a reduced one, and locking in a substantial loss. That is not a reasonable inference to draw. To the extent that the Complaint alleges that Fertitta's purported "insider" trading in his open-market purchases of shares was in itself a breach of the duty of loyalty, the Complaint fails to state a claim.

3. Fertitta's Negotiations With the Board Were Not Disloyal

Without any evidence that any of the members of the Board or the Special Committee lacked independence (Plaintiff does not even attempt to argue that any of the Special Committee members had any special relationship with Fertitta that would call into question their disinterest or independence), Plaintiff attempts to convince the Court that the Special Committee was completely beholden to Fertitta and incapable of making objective or independent decisions. Ans. Br. at 5 ("[T]he Company's Board was cowed from pursuing clear corporate rights primarily because of Fertitta's corporate position and domination."); *see also id.* at 24-28, 34-38, 41. Again, Plaintiff does not dispute the universally accepted principle that a potential acquirer of a company is entitled to negotiate a transaction that is in his own best interest. *Ivanhoe Pr's*, 535 A.2d at 1344. If that acquirer is also a fiduciary of the company being acquired, the acquirer avoids being on both sides of the transaction by declining to participate in the board's negotiation and deliberation process. Indeed, this is the entire point of having a special committee of independent and disinterested directors. The special committee concept recognizes the inherent conflict that arises when a fiduciary negotiates a transaction on his own behalf. As long as the special committee is actually independent and does not act in bad faith in fulfilling its role, there is no issue of disloyalty. The mere suggestion that Fertitta could *potentially* control the Special Committee is not sufficient to support an inference that he actually exercised such control. *In re*

W. Nat'l Corp. S'holders Litig., 2000 WL 710192, at *6 n.15 (Del. Ch. May 22, 2000) ("The potential ability to exercise control is not the equivalent of the actual exercise of that ability.").

Other than speculation, Plaintiff offers no facts from which one could reasonably infer that Fertitta manipulated or deceived the Special Committee. The Complaint does not allege that any knowingly false statements were made by Fertitta to the Special Committee about the Lending Banks or the status of the transaction. If the Special Committee had doubts about whether the Lending Banks intended to assert that a Material Adverse Event had occurred, there was nothing precluding a representative of the Special Committee or its advisors from contacting the Lending Banks directly. In fact, such direct contacts occurred. *See, e.g.,* Revised Proxy at 47, 52. Similarly, nothing precluded counsel for the Special Committee from communicating with counsel for the Lending Banks regarding the merits of the argument that a Material Adverse Event had occurred. Nor was there any barrier to communications between the Special Committee and the Lending Banks regarding the Lending Banks' refusal to disclose certain of the contents of the Amended Debt Commitment Letter to the SEC. Fertitta was not responsible for that decision, as the information belonged to the Lending Banks, and there is no credible allegation that Fertitta controlled the Lending Banks' decisions. Simply stated, there were no barriers to direct communications between the Special Committee and the Lending Banks, and the Special Committee and its advisors had direct contacts, including face-to-face meetings, with representatives from the Lending Banks. *See* Revised Proxy at 52 ("[On October 10, 2008], representatives from Jefferies met with the special committee and its advisors...."); *see also, e.g., id.* at 32, 34. The allegations that Fertitta breached his fiduciary duty of loyalty by manipulating or controlling the Special Committee (which met at least forty-four times in the nine-month

period between Fertitta's initial expression of interest and the approval of the Amended Agreement) lack any factual support and are without merit.

4. The Cases Cited by Plaintiffs in Support of Their Argument that Fertitta Acted Inappropriately Are Readily Distinguishable

Plaintiff's strained interpretation of the case law does not save its argument. Indeed, Plaintiff's arguments are entirely dependent upon cases that are distinguishable. For example, and as discussed above, the absence of any threat or coercion in the current case is confirmed by the contrast between the facts surrounding the proposed merger and the facts in *Lacos Land*. *Supra* Part II(A)(1).

Plaintiff's reliance on *Mills Acquisition Co. v. Macmillian, Inc.,* 559 A.2d 1261 (Del. Ch. 1989), is also misplaced. Ans. Br. at 26. In *Mills*, a target company's CEO intentionally revealed the price and form of a bidder's proposal in an auction to a competing, and preferred, bidder for the company without the board's knowledge. *Id.* at 1275-1276. The tipping and the board's ignorance thereof destroyed the integrity of the auction. By contrast, the Revised Proxy and the reasonable conclusions that flow from the Complaint reveal that Fertitta and the Special Committee negotiated at arms' length. Plaintiff does not suggest that the Committee lacked material information upon which it made its decisions. In fact, the Committee and its independent financial and legal advisors were provided all material information by Fertitta and his advisors regarding Fertitta's open market share purchases and the possibility that the Lending Banks would declare that a MAE had occurred.

Plaintiff further cites to *Parnes v. Bally Entertainment Corp.*, 722 A.2d 1243 (Del. 1999), to support its claim that Fertitta put his own interests ahead of those of Landry's stockholders. Ans. Br. at 27. In *Parnes*, the plaintiff stockholders appealed from a Court of Chancery decision dismissing an action challenging a merger. The stockholders alleged that Bally's Chairman and

CEO informed all potential acquirors that his consent would be required for any acquisition of Bally and that, to obtain his consent, the acquiror would be required to make illegal payments and transfer Bally's assets to him. *Id.* at 1245-46. The stockholders also alleged that other interested acquirors may have paid a higher price but were discouraged from bidding because they were unwilling to participate in illegal transactions. The Delaware Supreme Court, finding those payments and asset transfers were potentially so egregious that board approval of the merger could not meet the test of business judgment, reversed the Court of Chancery's decision to dismiss the merger claim. *Id.* at 1246, 1245 n.12 (noting the entire board's apparent failure to exercise its business judgment in good faith). Plaintiff has not alleged with any factual reference that Fertitta made analogous illegal demands or somehow convinced the banks not to lend to Landry's, nor could it.

Finally, Plaintiff relies on *Bomarko, Inc. v. International Telecharge, Inc.*, 794 A.2d 1161 (Del. Ch. 1999), to support its arguments that Fertitta breached his fiduciary duties to Landry's stockholders by (i) buying out stockholders at a discounted price and (ii) interfering with the Company's ability to obtain needed financing. Ans. Br. at 27-28. In *Bomarko*, the defendant company, close to bankruptcy, had received a financing proposal from lender Bell Atlantic ("Bell") to effect a restructuring plan. The company's CEO, without notifying the board that Bell had made a proposal, counter-proposed financing terms for the company that were materially inconsistent with the company's needs, intending to divert financing and cause a merger with the CEO's newly controlled entity ("ONCOR"). *Id.* at 1170. The CEO's conduct, purposefully concealed from the board, interfered with any opportunity the company had to obtain financing from Bell. This financing would have enabled the company to avoid bankruptcy and restructure its debt, eliminated the need to enter into a service agreement with ONCOR, and effectively

dissolved the board's fear of losing its customer base in bankruptcy. *Id.* at 1170-71. Unlike the actions taken in *Bomarko,* Fertitta did not interfere with the Company's ability to obtain financing and instead was able, at the request and prior authorization of the Special Committee, to secure backstop financing for the Company in the event that the merger was not approved.[6]

* * *

The well-pleaded allegations of the Complaint, the reasonable inferences that flow therefrom, and the application of relevant case law all lead to a single reasonable conclusion: Plaintiff has failed to state a claim that Fertitta breached his fiduciary duties to Landry's and its stockholders. Accordingly, the claims against Fertitta should be dismissed with prejudice.

III. THE COMPLAINT FAILS TO STATE A CLAIM FOR AIDING AND ABETTING.

Plaintiff does not contest the fact that, if the Complaint fails to state a claim for breach of fiduciary duty against Fertitta, so too does it fail to state a claim for aiding and abetting breach of fiduciary duty against FAC and FHI. *See Manzo v. Rite Aid Corp.*, 2002 Del. Ch. LEXIS 147, at *21 (Del. Ch. Dec. 19, 2002) (dismissing a claim of aiding and abetting because the underlying breach of fiduciary duty was dismissed). As demonstrated above, the claims against Fertitta

[6] Similarly, Plaintiffs' citation to *McPadden v. Sidhu*, 964 A.2d 1262 (Del. Ch. 2008) is unavailing. In *McPadden*, the plaintiff challenged the sale by i2 Technologies, Inc. ("i2") of its wholly owned subsidiary to a management team lead by an officer of the subsidiary, Anthony Dubreville, for $3 million. *Id.* at 1263. Despite knowing that Dubreville harbored an interest in buying the subsidiary, the i2's board tasked him with running the sales process. *Id.* at 1266. The plaintiff alleged that in unfairly rigging the process to result in a sale to himself, Dubreville, among other things, ignored a competitor's expression of interest in buying the subsidiary for $25 million, incurred unnecessary expenses to drive down the subsidiary's revenue, artificially depressed the subsidiary's EBITDA, incurred unnecessary legal fees, and failed to solicit indications of interest from the subsidiary's direct competitors, which were its most likely buyers. *Id.* at 1265-66. The Court therefore held that the plaintiff had stated a claim for breach of fiduciary duty against Dubreville (but not the board that approved the sale). *Id.* at 1275-76. Plaintiff does not – because it cannot – make any similar allegations against Fertitta.

should be dismissed, and accordingly this Court should dismiss the aiding and abetting claim against FAC and FHI.

Even if Plaintiff were able to establish an underlying breach of fiduciary duty (which it cannot), the aiding and abetting claims still fail. In effect, Plaintiff's position is that by merely stating the words "knowingly participated" in its complaint, it has met the pleading requirements of Court of Chancery Rule 8. To the contrary, and consistent with the United States Supreme Court's decision in *Twombly*, 550 U.S. 544, Delaware courts have held that they will dismiss a complaint that does not "plead enough facts to *plausibly suggest* that the plaintiff will ultimately be entitled to the relief she seeks." *Desimone*, 924 A.2d at 928-29 (emphasis added); *In re Coca-Cola Enters, Inc. S'holders Litig.*, 2007 WL 3122370, at *4 n.28 (Del. Ch. Oct. 17, 2007) ("If a complaint were held sufficient simply because it restates the legal elements of a particular cause of action, Rule 8(a) would be rendered meaningless. Plaintiffs need not offer prolix tales of abuse belabored by needless details, but plaintiffs must allege *facts* sufficient to show that the legal elements of a claim have been satisfied."), *aff'd sub nom. Int'l Bros. Teamsters v. CocaCola Co.*, 954 A.2d 910 (Del. 2008); *see also supra* n.4.

As set forth in the Opening Brief, Plaintiff's claims with respect to FAC and FHI are entirely conclusory, and legally insufficient to state a claim upon which relief can be granted. Op. Br. at 29-31. Nothing in the Answering Brief changes that result, and these claims should therefore be dismissed.

IV. PLAINTIFF HAS FAILED TO STATE A CLAIM AGAINST THE BOARD

Plaintiff concedes that the actions of the Special Committee are, at least as an initial matter, entitled to the presumptions associated with the business judgment rule. *See* Ans. Br. at 30 ("In general, corporate directors and officers are entitled to a presumption that their conduct was loyal to the corporation and in good faith."). Moreover, Plaintiff concedes (as it must) that

unless the Complaint contains well-pleaded allegations of fact sufficient to rebut those presumptions, "the judgment of a properly functioning board will not be second-guessed...." *Id.* (citations omitted).

Plaintiff's entire claim against the Special Committee therefore rests on a determination of whether the Complaint adequately alleges facts from which this Court could infer that the Special Committee is not entitled to the protections of the business judgment rule. Plaintiff attempts to make this showing in two ways. First, Plaintiff asserts that Fertitta's alleged breach of his duty of loyalty "taint[ed] the entire negotiation and approval process of the subject transaction." *Id.* at 31. Second, Plaintiff suggests that the Complaint adequately alleges that the Special Committee's actions were taken in bad faith. *Id.* Neither of these contentions has merit. *See supra* Part II(A)(3); Op. Br. at 31-44. Moreover, for the reasons explained below, none of the arguments raised by Plaintiff in its answering brief compels a different result.

A. Fertitta's Actions Did Not Undermine the Function of the Special Committee

Relying on wholly distinguishable precedent, Plaintiff argues that Fertitta's actions somehow undermined the legitimacy of the Special Committee process such that the decisions of the Special Committee are no longer entitled to review under the business judgment rule. For instance, Plaintiff cites to the Delaware Supreme Court's decision in *Mills Acquisition.*, 559 A.2d at 1279, as "most instructive" on how this Court should assess the actions of the Special Committee. *See* Ans. Br. at 31. Plaintiff quotes the *Mills Acquisition* court in stating that a board that is "deceived by those who will gain from [] misconduct" will not receive the protections of the business judgment rule as to the decisions made based upon such deception. *Id.* (quoting *Mills Acquisition*, 559 A.2d at 1284). In *Mills Acquisition*, the Court declined to apply the business judgment rule where the integrity of a board's deliberative process was compromised by the company's CEO disclosing competing bids to his preferred bidder during an

auction for the company. This alone renders the holding in *Mills Acquisition* wholly inapposite to the facts here. Nowhere does the Complaint suggest that the Special Committee was deceived, or was otherwise basing its decisions on inaccurate or incomplete information.

Plaintiff's citation to *Bomarko* is similarly unavailing. As noted above, the CEO in that case concealed a financing proposal from the board while at the same time pushing alternate financing and ultimately a cash-out merger with his own wholly owned entities. 794 A.2d at 1170-71. The Court concluded that, based on the CEO's conduct, judicial review of the ultimate merger could not proceed under the business judgment rule; rather, the deception of the special committee by the CEO resulted in an inability to bargain at arm's length, and a situation where the committee (inaccurately) believed that it had no option and that the failure to agree to the CEO-driven transaction would result in bankruptcy. *Id.* at 1179. As in *Mills Acquisition*, the deceitful conduct of the CEO compromised the committee's deliberative process.

Plaintiff has alleged no facts to suggest that the holdings of *Mills Acquisition* and *Bomarko* have any application to the facts here. Indeed, there is simply no suggestion that Fertitta misled, deceived or concealed *any* information from the Special Committee. Instead, Plaintiff alleges solely, and in conclusory fashion, that Fertitta exerted his will on the Special Committee that, while concededly disinterested, nevertheless acceded to Fertitta's wishes without considering the effects on the Company. Even if these allegations were supported by any of the facts plead in the Complaint, which they are not, this is a much different question than the courts faced in *Mills Acquisition* and *Bomarko*, and their holdings are therefore not relevant to this motion.

The reliance on inapposite case law is not surprising, however, because as was pointed out in the Opening Brief, the Special Committee diligently worked on an arms' length basis to

protect the best interests of Landry's stockholders in the negotiation of the Merger Agreement, the Amended Agreement, and in the decision to terminate the Amended Agreement. The Revised Proxy lists no less than forty-four Special Committee meetings, sixteen of which occurred in the approximately month-long period between Hurricane Ike making landfall in Texas and the Special Committee's unanimous determination to recommend that the Board approve the Amended Agreement on October 18, 2008. Revised Proxy at 20-56. Moreover, the Revised Proxy makes clear that the Special Committee was exceedingly careful to ensure that its members and its advisors – both financial and legal – were independent of Fertitta and Landry's and therefore able to provide the highest level of advice, uncompromised by outside influences. See, e.g., Revised Proxy at 21 ("The K&S representative confirmed that the firm had no prior relationships with [Landry's], Mr. Fertitta, any member of the special committee or any other person that might pose ...a conflict...."), 24 ("The Cowen representatives confirmed that Cowen had no prior relationships with [Landry's], Mr. Fertitta or any member of the special committee or their businesses."), 52 (confirming no conflict existed in October). The only logical inference that flows from the Complaint and the documents it incorporates by reference is that the Special Committee was a fully functioning, well-informed and advised entity that was able to engage in arms' length negotiations with Fertitta over the transactions at issue. Plaintiff's suppositions to the contrary do not support any claim for relief.

B. Absent a Showing of Interestedness, Lack of Independence or Bad Faith, the Special Committee's Decision Not to Restrain Fertitta's Stock Purchases Is Entitled to Business Judgment Rule Protection

While Plaintiff correctly points out that the Board had a duty to protect the Company and its stockholders, how the Board went about doing so is a matter of its business judgment. Indeed, this Court recognized as much in *Day v. Quotron Sys., Inc.*, noting that while "the Court is mindful that corporate directors owe an affirmative duty to the corporation ... to protect and

defend [its] interests … the board is ... entitled to have its decision not to enact a defensive measure protected by the business judgment rule." 1989 WL 150773, at *5 (Del. Ch. Nov. 20, 1989). Accordingly, absent a showing of interestedness, lack of independence, or bad faith[7] on the part of the Special Committee in declining to invoke defensive mechanisms to restrain Fertitta's open-market purchases, that decision is entitled to the protections of the business judgment rule.

1. Plaintiff Has Failed to Allege that the Special Committee Acted in Bad Faith

Unable credibly to allege that the Board was interested in the decisions to forgo defensive measures and ultimately terminate the Amended Agreement, or that those decisions were the product of Fertitta's domination and control of the individual members of the Special Committee, Plaintiff is resigned to claiming that the Special Committee's decisions were made in bad faith. *See* Ans. Br. at 35 (arguing that the Special Committee's actions "evidence[] actionable bad faith"). Of course, for a claim of bad faith to survive, it must be alleged that the members of the Special Committee "intentionally fail[ed] to act in the face of a known duty to act, demonstrating a conscious disregard for [their] duties." *Lyondell Chem. Co. v. Ryan*, 2009 WL 1024764, at *7 (Del. Mar. 25, 2009) (citation omitted). Importantly, the *Lyondell* Court emphasized the "vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties," and held that the appropriate inquiry for disinterested, independent directors is whether they "utterly failed to attempt" to discharge their duties. *Id.*

Plaintiff has failed to allege facts that plausibly suggest that the Special Committee's decisions fell to this level of dereliction. Rather, as set forth in the Opening Brief and confirmed

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[7] Even if the Complaint contained well pleaded allegations from which the Court could infer that the Special Committee breached its duty of care in connection with the challenged actions – which it does not – Landry's Certificate of Incorporation contains a provision exculpating its directors from personal liability for any such violation. *See* OB at 35.

by the clear implications of the Complaint and the Revised Proxy, the Special Committee met on dozens of occasions, fully considered its options with the advice of independent advisors, and determined to act in what it felt were the best interests of Landry's and its stockholders. *See* Op. Br. at 36-44. At each stage of the process, the Special Committee's actions were designed to put Landry's stockholders in the best possible position, either by ensuring that its decision on whether or not to approve the Merger would not be tainted by the threat of bankruptcy, or to ensure that, once the Lending Banks exercised their right not to allow disclosure of the amended debt commitment letters, the alternative financing remained in place. *Id.*

Plaintiff attempts to avoid the application of the business judgment rule by arguing that the Special Committee acted in bad faith by "fail[ing] to take required action in the face of a known threat to the corporation and its stockholders," Ans. Br. at 34, or demonstrating actionable "indifference" to the dangers posed by Fertitta's alleged domination. Ans. Br. at 36. As an initial matter, Plaintiff's claims of actionable indifference are belied by the facts before the Court: As set forth above and in the Opening Brief, the Special Committee took its task very seriously, engaged high-quality and independent advisors and met often to discuss the appropriate path forward, including whether to act in response to Fertitta's stock purchases. *Supra* at 3-5; *see also* Op. Br. at 31-44; Revised Proxy at 41, 52-53. Moreover, there are no well-pleaded allegations in the Complaint sufficient to support a finding that Fertitta controlled the terms of this transaction. *Supra* Part IV(A). The Special Committee had the option of just saying "no." Revised Proxy at 62. Indeed, the Special Committee declined to start negotiating with Fertitta until after its financial advisor presented the committee with the Company's strategic alternatives and after the Committee determined whether a sale to Fertitta was in the best interests of the Company and its stockholders. Revised Proxy at 25, 29.

Finally, and as set forth in detail in the Opening Brief, there was no "action" that the Board or the Special Committee was required to take in these circumstances. Op. Br. at 42-44. The Special Committee was aware of Fertitta's actions, considered, among other things, his acquisition of additional shares on the open market, and attempted to get Fertitta to agree to a form of standstill. Revised Proxy at 41, 52-53. Even if there were a "known threat" to the corporation posed by Fertitta's actions, there simply is no *per se* rule of law that sets forth when and in what manner a corporate board is required to take action in response – a fact which nullifies Plaintiff's argument that the Board consciously disregarded its duties. Particularly where, as here, the Special Committee met and deliberated on the facts as presented to it including Fertitta's open market purchases. Revised Proxy at 41, 52-53; *cf. Lyondell*, 2009 WL 1024764, at *7 ("[T]here are no legally prescribed steps that directors must follow to satisfy their *Revlon* duties. Thus, the directors' failure to take any specific steps during the sale process could not have demonstrated a conscious disregard of their duties."). A board's decision not to enact defensive measures in response to a threat is analyzed under the presumptions of the business judgment rule, and Plaintiff has failed adequately to plead facts sufficient to rebut the presumptions of that rule. *Day*, 1989 WL 150773, at *5.

* * *

The Opening Brief establishes that the clear implication of the Complaint and the documents incorporated by reference therein is that the entire Board acted in good faith pursuit of the corporation's best interests, and the challenged actions are not so egregious on their face so as to fail to be rational. As was the case in *Lyondell*, nothing in the Complaint suggests that the Board failed to act; the mere fact that the Board did not act as Plaintiff would have liked is not sufficient to state a claim that the Board breached its fiduciary duties. *Lyondell*, 2009 WL 1024767, at *7. Nothing in the Answering Brief changes that conclusion.

V. PLAINTIFF HAS FAILED ADEQUATELY TO ALLEGE DEMAND FUTILITY

A. Plaintiff Has Failed To Allege Particularized Facts Sufficient To Raise A Reasonable Doubt as to the Independence of the Special Committee

With respect its purported derivative claim in Count IV of the Complaint, Plaintiff's attempt to explain away its failure to make a pre-suit demand is not persuasive. Conceding that the majority of the Board was disinterested in the decision to terminate the Amended Agreement (and therefore render the reverse termination fee inapplicable), Plaintiff attempts to satisfy the required showing of demand futility through circuitous, unsupported and conclusory allegations that the Board was not independent of Fertitta. For example, Plaintiff makes much of the allegation that Fertitta was the Company's controlling stockholder during the relevant period. *See* Ans. Br. at 41-43. Even if Fertitta were a controlling stockholder at the time the Merger Agreement was terminated, which Defendants do not concede, Plaintiff fails to cite to any authority for the proposition that otherwise concededly independent directors are deemed under the domination and control of a controlling stockholder simply by reason of his stock holdings. Indeed, in *Aronson*, the Delaware Supreme Court made clear that "in the demand context even proof of majority ownership of a company does not strip the directors of the presumptions of independence[.]" *Aronson v. Lewis*, 473 A.2d 805, 815 (Del. 1984); *see also Williams v. Geyer*, 671 A.2d 1368, 1378 & n.22 (Del. 1996) (noting that the mere fact that controlling stockholders held a "dominant stock interest" does not "call the directors' independence into question"). Rather, a complaint also must allege "such facts as would demonstrate through personal or other relationships the directors are beholden to the controlling person." *Aronson*, 473 A.2d at 815. The question of whether the Board is independent of Fertitta involves a "fact-specific determination," and "must be resolved director-by-director, based on particularized allegations of

fact." *Khanna v. McMinn*, 2006 WL 1388744, at *15 (Del. Ch. May 9, 2006). At bottom, Plaintiff does not even attempt to make this required showing.

Plaintiff's after-the-fact attempt to buttress the lack of factual allegations regarding the purported lack of independence of the Special Committee does not satisfy the requirements of Rule 23.1. First, Plaintiff claims that, in addition to Fertitta's status as a controlling stockholder, he was the "influential force" in the merger negotiations and "dictated the terms of the merger," and that such facts create a reasonable doubt as to the remaining directors' independence. *See* Ans. Br. at 43 (describing allegations as to renegotiation and ultimate termination of merger agreement). The fact that Fertitta was successful in renegotiating the merger agreement to a lower price (which is the nub of Plaintiff's allegations), is simply not adequate in the prevailing circumstances to establish a reasonable doubt as to the Special Committee's independence.

Next, Plaintiff alleges that Fertitta's control of communications with the Lending Banks gave him "exclusive access to both sides of the deal." *Id.* at 44. As described above, however, the Lending Banks were providing *Fertitta* with financing, not the Special Committee or the Company. The Special Committee was negotiating against Fertitta and had been advised for months by its own team of financial and legal advisors. In any event, as demonstrated above, the Special Committee and its advisors did have direct communications with representatives of the Lending Banks. *See* Revised Proxy at 32, 34, 41, 52.

Nevertheless, Plaintiff claims that by allowing Fertitta unfettered access to *his own* banks, the Special Committee "delegated" its duties to Fertitta. Ans. Br. at 44. This argument is insufficient to establish reasonable doubt as to the independence of the Special Committee. It appears that Plaintiff is attempting to shoehorn the facts of this case into those of *Kahn v. Tremont*, 1994 WL 162613 (Del. Ch. Apr. 22, 1994), which Plaintiff quotes as stating that a

special committee is deemed controlled where it "delegated the bulk of its work to [the controlling stockholder], the member arguably most interested in the transaction." Ans. Br. at 44 (bracketing in Answering Brief). In *Kahn*, the committee consisted of three members, all of whom had preexisting relationships with the controlling stockholder who, contrary to Plaintiff's suggestion, was not on the committee. *See Kahn*, 1994 WL 162613, at *3. Nor did the committee delegate anything to the controlling stockholder. Rather, the committee "delegated the bulk of the committee's work" to one member who the Court deemed to be "arguably the most interested" of the three. *Id.* at *5. The facts of *Kahn*, and the *actual* holding of the court based on those facts, are wholly inapplicable.

Here, by contrast, the Special Committee emphasized both to Fertitta and the rest of Landry's management the importance of finding alternative financing arrangements for the $400 million of Debt coming due in February, 2009. *See* Revised Proxy at 42, 52.[8] Despite diligent efforts by both Fertitta and other members of management, not a single alternative to the backstop financing agreed to by the Lending Banks was ever located. *Id.* Without the Lending Banks' agreement in connection with the revised debt commitment letter to provide backstop financing for the Debt if the transaction did not go through, Landry's might not have been able to find financing – an event which would have had serious repercussions on Landry's ability to operate as a going concern. Revised Proxy at 46.

Finally, Plaintiff alleges that the Special Committee's lack of independence is evidenced by its hesitance to engage in litigation with the Company's President and CEO. Ans. Br. at 45. But this hesitance was a perfectly rational business decision. The Board weighed the option of

[8] Importantly, certain note holders had indicated to Landry's management that they were likely to require redemption of the notes in February 2009, thereby indicating that the Debt was likely to come due at that time. Revised Proxy at 52.

pursuing litigation against Fertitta and the Lending Banks, but determined that it would cause such disruption in operations that the payoff was simply not worth it for the Company. Op. Br. at 37-38; *see also* Revised Proxy at 38-56 (discussing the Special Committee's actions and deliberations). Regardless of whether or not Plaintiff agrees with that decision after the fact, this balancing conducted by the Special Committee is exactly the type of "hard decision" that directors are required to make and that will not be second-guessed by the Court. *See Gagliardi v. TriFoods Int'l, Inc.*, 683 A.2d 1049, 1053 (Del. Ch. 1996) (absent well-pled allegations of conflicting interests or motivations, even where a director made a "hard choices" that later could be construed as "poor business practices," "permit[ting] the possibility of director liability ... would be very destructive of shareholder welfare in the long-term"). Moreover, there is not a single allegation in the Complaint as to any personal or business relationships between Fertitta and any member of the Special Committee that would suggest that the decision not to take legal action against Fertitta was based on anything other than the Special Committee's honest beliefs as to the best interests of the Company.

At the end of the day, Plaintiff can point only to the fact that Fertitta now owns more than 50% of the outstanding stock of Landry's and that, prior to owning that level of stock, he was able to renegotiate the Merger Agreement at a lower price. From this, Plaintiff asks the Court to find that the Special Committee (consisting entirely of concededly outside, disinterested directors) was beholden to Fertitta. Such strained allegations are simply insufficient to support such a finding.

B. Plaintiff Has Failed To Allege Particularized Facts Sufficient To Raise A Reasonable Doubt that the Special Committee's Decision To Terminate the Merger Agreement Was the Product of a Valid Business Judgment

As set forth in Defendants' Opening Brief, the second prong of the *Aronson* test is applicable only in "extreme" circumstances, and requires the court to apply a test similar to that

applied to allegations of corporate waste. *See* Op. Br. at 47 (quoting *Kahn*, 1994 WL 162613, at *6). "Directors are guilty of corporate waste, only when they authorize an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration." *Glazer v. Zapata Corp.*, 658 A.2d 176, 183 (Del. Ch. 1993).

Plaintiff's only argument with respect to the rationality of the Special Committee's decision to terminate the Amended Agreement simply ignores the arguments set forth in the Opening Brief and represents a fundamental misunderstanding of the terms of the Amended Agreement itself. Specifically, Plaintiff admits (as it must) that the Lending Banks, as they were entitled to do, refused to allow the Company to disclose the debt commitment letter when the SEC indicated that it would require this disclosure before approving of the preliminary proxy. Ans. Br. at 46; Compl. ¶ 64. Plaintiff argues that this "pretense about disclosure does nothing to relieve Fertitta of his obligation to pay the required Reverse Termination Fee," and that the Special Committee's decision is therefore outside the bounds of rationality. *Id.* Plaintiff is wrong.

The approval of Landry's stockholders was a condition precedent to either party's obligation to close the merger. Op. Br. at 40; Revised Proxy at A-40 (Merger Agr. § 8.01). The Amended Agreement required the Company to submit a final proxy to Landry's stockholders *after* it made revisions to the preliminary proxy demanded by the SEC. Revised Proxy at A-29 (Merger Agr. § 7.01(a)). Before it would approve the preliminary proxy, the SEC insisted on disclosure certain terms of the Lending Banks' debt commitment letter. Compl. ¶ 62; Jan. 12, 2009 Press Release at 1. The debt commitment letter required that the requested information be kept confidential, however, and the Lending Banks indicated that they would exercise their right

to terminate the debt commitment letter if the information were disclosed. Compl. ¶¶ 63-64. Without approval from the SEC, the Company was not in a position to comply with its obligations under the Amended Agreement. The difficult situation in which the Special Committee was placed by this turn of events was described in detail in the Opening Brief and left unaddressed by Plaintiff in the Answering Brief:

> If the Company chose to disclose the information demanded [by the SEC], the Lending Banks would terminate the debt commitment letter, which would relieve them of their obligation to fund the Merger *and* would leave the Company without a valid means of refinancing the Notes [in February 2009] when the Merger failed for lack of financing. The Special Committee was therefore presented with a Hobson's Choice: It could push for a vote by filing the proxy statement with the SEC's proposed revisions (which would violate the debt commitment letter and cause the Lending Banks to pull the financing commitment for the merger and the alternative financing commitment, thus leaving Landry's with nothing) or it could seek to terminate the Amended Agreement and thereby retain the alternative financing commitment from the Lending Banks.

Op. Br. at 40-41.

Under the circumstances, the Special Committee's decision to recommend that the Board terminate the Amended Agreement – and thereby preserve the backstop refinancing for the approximately $400 million in Debt that was quickly coming due – instead of pushing forward with the Merger and being left with a $15 million termination fee when the Merger failed for lack of financing, was eminently rational. Since this decision clearly had a "legitimate business purpose[]," Plaintiff cannot meet the second prong of *Aronson*. *Grobow v. Perot*, 539 A.2d 180, 189-90 (Del. 1988).

* * *

Because Plaintiff has failed to allege particularized facts sufficient to demonstrate that demand on the Board would have been futile as to Count IV, this Count should be dismissed pursuant to Rule 23.1.

VI. DISCOVERY SHOULD BE STAYED

"[T]his Court has often stayed discovery to prevent the unnecessary imposition of undue burden or expense during the pendency of the resolution of a dispositive motion, absent special circumstances." *In re Yahoo! Inc. S'holders Litig.*, 2008 Del. Ch. LEXIS 91, at *1 (Del. Ch. July 11, 2008). The onus of responding to "even ordinary types of discovery" is sufficient to satisfy the movant's burden of showing a "practical reason" why discovery should be stayed. *See Skubick v. New Castle County*, 1998 WL 118199, at *2 (Del. Ch. Mar. 5, 1998). Plaintiff has not identified any special circumstances sufficient to permit discovery pending resolution of a dispositive motion. The motion to stay discovery should therefore be granted.

CONCLUSION

For the foregoing reasons, as well as those set forth in their Opening Brief, Defendants respectfully request that the Court grant their motion to dismiss and motion to stay discovery.

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